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Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 534

CLARENCE NORRIS,

Petitioner,

against

STATE OF ALABAMA.

PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1934.

CLARENCE NORRIS,

Petitioner,

VS.

STATE OF ALABAMA.

PETITION FOR WRIT OF CERTIORARI.

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Clarence Norris, respectfully alleges:

A.

Summary statement of the matter involved.

Petitioner is now confined in Kilby Prison in the City of Montgomery, State of Alabama, under sentence of death for the alleged crime of rape. His execution is set for February 8, 1935. He was convicted at a trial held in Morgan County, Alabama, before Judge Callahan and a jury. An appeal was taken from that conviction to the Supreme Court of Alabama, which is the highest court of the State of Alabama. The conviction was affirmed by that Court on June 28, 1934. A timely application was made on July 9, 1934 for a rehearing, which application was received and considered by the Court. The application for a rehearing was denied on October 4, 1934.

At the outset of the case petitioner moved to quash the indictment on the ground that the grand jury which brought in the indictment in Jackson County had been drawn from jury rolls from which negroes had been excluded because of race or color. Petitioner also moved to quash the venire of the petit jury in Morgan County where the action had been brought on for trial on the ground that negroes had been excluded because of race or color from jury service in that county. The Court refused to permit petitioner to introduce evidence which petitioner deemed necessary to support the claim of exclusion.

B.

Reasons relied on for the allowance of the writ.

1. Petitioner was denied the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Constitution of the United States in that negroes were excluded from jury service in Jackson County, Alabama, in which county was found the indictment against him, and that such exclusion was by reason of their color.

A motion was made by your petitioner before the commencement of the trial to quash the indictment on these grounds. The motion was entertained and evidence introduced in support thereof which established such discrimination. The claim of federal right was considered both by the trial court and by the Supreme Court of the state.

2. Petitioner was denied the equal protection of the laws guaranteed to him by the Fourteenth Amendment of the Constitution of the United States in that negroes were excluded from jury service in Morgan County, Alabama, the county in which the case was tried, and that such exclusion was by reason of their color.

A motion was made by your petitioner before the commencement of the trial to quash the venire on these grounds. The motion was entertained and evidence introduced in support thereof which established such discrimination. The claim of federal right was considered both by the trial court and by the Supreme Court of the state.

3. Your petitioner was on numerous occasions, both with reference to the motion to quash the indictment and with reference to motions to quash the venire, deprived of an opportunity of offering material proof in support of his contention that discrimination had been practiced.

In support of the foregoing grounds of application your petitioner submits the accompanying brief setting forth in detail the precise facts and arguments applicable thereto.

WHEREFORE your petitioner prays that this Court, pursuant to United States Judicial Code, Section 237 b, as amended by Act of February 13, 1925, 43 Statutes 973, issue a writ of certiorari to review the judgment of the Supreme Court of the State of Alabama affirming your petitioner's conviction for rape, as aforesaid.

All of which is herewith respectfully submitted this 17th day of November, 1934.

CLARENCE NORRIS, Petitioner,
By WALTER H. POLLAK,
OSMOND K. FRAENKEL,
Attorneys.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1934.

CLARENCE NORRIS,

Petitioner,

against

STATE OF ALABAMA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court below.

The opinion has not yet been reported officially. It appears in 156 So. 556 and at pages 676-695 of the record.* An application for rehearing was denied without opinion (705-706).

II.

Jurisdiction.

1.

The statutory provision is Judicial Code, § 237b as amended by Act of February 13, 1925, 43 Stat. 937.

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*All references are to the Norris record except where we specifically refer to the companion record in the Patterson case. Because of the somewhat confused condition of the record, an index to it is printed in the Appendix to this brief.

2.

The date of the judgment is June 28, 1934 on which date the Alabama Supreme Court affirmed (699). A petition for rehearing was filed on July 9, 1934 (702). The application was denied on October 4, 1934 (704-705).

3.

That the nature of the case and the rulings below bring the case within the jurisdictional provisions of § 237b, *supra*, appears from the following:

The claim of federal constitutional rights is specifically made in the motion to quash the indictment (49) and the motion to quash the venire (424). The questions were expressly considered and the rights ruled against by the trial court (163, 495). Exceptions were noted to each ruling (167, 497). The questions were specifically passed upon by the Alabama Supreme Court in its opinion (676-684, 685, 689).

The claims so made and denied are that the systematic exclusion of negroes because of race or color for service on grand and petit juries in Jackson County where the grand jury was drawn (48-49) and in Morgan County where the petit jury was drawn (423-424) was in violation of the Constitution and laws of the United States. Incidental to these claims is the further contention that the Court erred in excluding further evidence offered by petitioner to prove discrimination and exclusion (see *infra*, pp. 25-28).

4.

The following cases among others sustain the jurisdiction:

Strauder v. *West Virginia*, 100 U. S. 303, 309; *Neal* v. *Delaware*, 103 U. S. 370, 397 and *Rogers* v. *Alabama*, 192 U. S. 226, 231, establish that the exclusion of negroes from grand and petit juries solely on the ground of their race

or color is in violation of the Constitution. *Carter* v. *Texas*, 177 U. S. 442, 448, 449, holds that the refusal to give the defendant a full opportunity to prove his claim of discrimination is a denial of the federal constitutional rights. *Beidler* v. *Tax Commission*, 282 U. S. 1, 8; *Fiske* v. *Kansas*, 274 U. S. 380, 385-6; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261 and *Ancient Egyptian Order* v. *Michaux*, 279 U. S. 737, 745, decide that where a federal right has been asserted and denied, it is the province of this Court to ascertain whether the conclusion of the state court has adequate support in the evidence.

III.

Statement of the case.

Petitioner is one of nine negro boys charged with raping two white girls, Victoria Price and Ruby Bates, on a freight train proceeding through Alabama.

As to one of the boys, a mistrial was declared. The other eight were found guilty and sentenced to death after a trial at Scottsboro during April, 1931.

The Supreme Court of Alabama reversed the conviction as to one of the boys and affirmed as to seven, including this defendant (*Weems, et al.*, v. *State*, 224 Ala. 524) and the defendant Patterson (*Patterson* v. *State*, 224 Ala. 531; see also *Powell, et al.*, v. *State*, 224 Ala. 540). These judgments were subsequently reversed by this Court (*Powell, et al.*, v. *Alabama*, 287 U. S. 45). Thereafter by order filed March 20, 1933, the venue was changed from Jackson to Morgan County (6).

Patterson, one of the seven, was subsequently brought to trial before Judge Horton in Morgan County and was convicted. The verdict of conviction was set aside. The opinion of Judge Horton is printed in the Appendix to the brief on the Patterson application for certiorari.

*The motion to quash the indictment.**

When the Patterson case came up for trial for the third time—this time before Judge Callahan—the motion was made on behalf of the seven defendants (50) to quash the indictment because of exclusion of negroes from juries in *Jackson* County. The motion had theretofore been made before Judge Horton, but since he set aside the conviction, his rulings never became subject to review. Part of the evidence before Judge Horton was read into the record before Judge Callahan (89-148) and this, in addition to new testimony before Judge Callahan (57-88, 149-61), constitutes the record on the motion to quash. Judge Callahan denied the motion with an opinion (163-167). Exception was taken to the denial of the motion (167).

*The motion to quash the venire.**

On November 21, 1933 Patterson moved to quash the trial venire (418-425) on the ground of exclusion of negroes from the juries in *Morgan* County. That motion was likewise denied by Judge Callahan with an opinion (495-498). Again the record includes evidence taken before Judge Horton (429-491) and new matter introduced before Judge Callahan (491-494). Exception was taken to the denial of the motion to quash the venire (497).

Patterson was brought to trial for the third time and was found guilty on December 1, 1933 (Patterson, 19). Norris was tried for the second time and found guilty on December 6, 1933 (22). Both defendants were on December 6th sentenced to death. (A continuance has been granted to the other five negroes and they have not yet been tried. The cases of the two juveniles have been sent to the Probate Court for consideration.)

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*By stipulation the proceedings in the Patterson case on the motion to quash the indictment and to quash the venire are made applicable to the defendant Norris (42a), and accordingly the motions, testimony and rulings are set forth in full in the present record (43-167, 418-498).

Appeals were taken to the Supreme Court of Alabama (Patterson R., 786, Norris R., 674).* After affirmance by the Court an application for a rehearing was made (702) and denied (705) as stated above.

The facts concerning the exclusion of negroes from jury service are discussed *infra* (pp. 10-24).

IV.

Errors below relied upon here. Summary of argument.

The points we urge are in summary form as follows:

1. The indictment of a member of the negro race and his conviction by juries from which negroes are systematically excluded is a denial of the equal protection of the law.

2. The Court denied petitioner's constitutional rights in refusing to quash the indictment by the grand jury in Jackson County where negroes had for years been excluded from jury service.

3. The Court denied petitioner's constitutional rights in refusing to quash the venire of the petit jury in Morgan County where negroes had for years been excluded from jury service.

4. The Court denied petitioner's constitutional rights in refusing to permit the petitioner full opportunity to prove that negroes were systematically excluded.

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*Before the appeal to the Supreme Court motions for a new trial were made in each case (Patterson R., 24, Norris R., 23). Upon application by the State each motion was stricken on the ground that it was made after the term. Applications for a rehearing were made pointing out that the trial court with the knowledge of the Attorney General of Alabama had extended the time of the defendants to make their motions beyond the term, and that the defendants relied on the court's statement that their time to make the motion extended to dates which were subsequently decided to have been beyond the date of the expiration of the term. (33-35). The matter has no relevancy to the petitioner Norris's application for certiorari except as bearing upon the attitude in this case of the court and of the officers charged with the administration of justice in Alabama. Because of its possible relevance, however, to the Patterson application it is discussed in the Patterson brief.

POINT I.

The indictment of members of the negro race and their conviction by juries from which negroes are systematically excluded is a denial of the equal protection of the law.

The principle applies whether the action is by virtue of a statute (*Strauder* v. *W. Va.*, 100 U. S. 303, 309; *Bush* v. *Kentucky*, 107 U. S. 110, 122) or by the action of the administrative officers (*Neal* v. *Delaware*, 103 U. S. 370, 397; *Carter* v. *Texas*, 177 U. S. 442; *Rogers* v. *Alabama*, 192 U. S. 226, 229; *Martin* v. *Texas*, 200 U. S. 316, 319), and whether the exclusion is from service on petit juries (*Strauder* v. *W. Va.*, *supra*, at pp. 304-309; *Neal* v. *Delaware*, *supra*, at p. 396), or grand juries (*Carter* v. *Texas*, *supra*, at p. 444; *Rogers* v. *Alabama*, *supra*, at p. 229).

In Alabama, the statute (Code, §8603, Appendix, p. 30) does not in terms provide for the exclusion, but the evidence discloses an exclusion or discrimination by administrative officials as uniform as if provided for by statute.

The Alabama Supreme Court, while recognizing the principles referred to (678, 679), failed, as we shall show, to apply them to the facts of this case, and by reason of such failure it denied petitioner his constitutional rights.

POINT II.

The court denied petitioner's constitutional rights in refusing to quash the indictment by the grand jury in Jackson County where negroes had for years been excluded from jury service.

Proof of Exclusion.

A. The population of Jackson County in 1930 was 36,881 (89). The male population over 21 was 8,801, of which 666 were negroes (92).

B. That there was actual exclusion, that white men served on juries in Jackson County, and that negroes did not and had not for upwards of fifty years, is established and uncontradicted. No negro was called on this grand jury (61). No negro had served on any grand or petit jury in Jackson County in the memory of any man, and men white and colored testified,—men who had lived in Jackson County all their lives, many of them over fifty years of age (119, 127, 137, 140, 144, 145, 146). No negro was ever called for jury duty in the memory of men who had lived forty to fifty years in the county (135, 119). The testimony of the negroes was confirmed by the following white officials:

Two jury commissioners (58, 78); the clerk of the Circuit Court (60); the clerk of the jury commission (69); the court reporter for the Ninth Judicial Circuit (76).

A 76-year old negro testified:

> "It is a matter of custom in Jackson County that no negro can sit on a jury, that has been a custom for sixty years" (147).*

*Compare the statement in the charge of the trial court referred to in *Roberson* v. *State*, 18 Ala. App. 634, in the case of a white man indicted for the killing of a negro:

(*Footnote continued on next page.*)

Further, except for six names shown, *infra*, by irrefutable evidence to have been forgeries, no negro's name appeared on any jury roll from which grand and petit juries alike (61) were drawn.

C. This evidence, uncontradicted and undisputed, presents, without more, a *prima facie* case of denial of equal protection (*Neal* v. *Delaware*, supra, 103 U. S., at p. 397). But the evidence does not rest here.

D. That there were qualified negroes in the county is beyond debate. The qualifications for jurors are stated in the Alabama Code, § 8603 (Appendix, p. 30). Witnesses testified by name to at least 37 negroes who they said had these qualifications. Included in these names were negroes who were members of school boards of colored schools appointed by the white Superintendent of Education (126-127); trustees of colored schools who had been elected by the negroes who were qualified voters (127-128-129-133); property owners and householders (128, 129). Negroes from the county had sat on the Federal jury (119, 120). The trial court assumed that negroes in the county were qualified for jury duty (164). Indeed Judge Callahan rested his refusal to quash the indictment solely on the ground—mistaken as we shall show—that names of negroes appeared on the jury roll.

E. The Supreme Court, while it did not hold that there were no negroes in the county fit for jury duty, expressed

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(*Footnote continued from previous page.*)

> "Now, gentlemen, there has been an effort to inject into this case race prejudice. The colored man is in this country, and he has been deprived in a large measure of the right to vote, *he has been deprived entirely of the right to sit on the juries of this country*, and the enforcement of the laws of this country is in the hands of the white people, and it should be enforced with equal justice and equal right to the white man and the colored man alike" (pp. 635-6).

It should be stated that this case did not come up from Jackson County. Compare also *Rogers* v. *Alabama*, 192 U. S. 226.

some doubt upon this point (683), especially referring to the testimony of Benson, the editor of the local newspaper. Benson had said that while he knew "some good negroes, with good reputations" he "would not be willing to say that there were any that possessed the necessary qualifications for jury service;" that "those he knew lacked that sound judgment that should characterize a juror" (683).

Fifty years ago, this Court dismissed a like general conclusion of negroes' unfitness for jury service—uttered not by a witness but by the Chief Justice of the court of last resort of the state—as a "violent assumption" (*Neal* v. *Delaware, supra,* 103 U. S., at p. 397).*

And an examination of Benson's testimony confirms that his conclusions are based solely upon his prejudice against negroes and his attitude of superiority.

Apart from this, however, the evidence showed that many negroes were qualified, and although Benson purported to testify that some were not qualified, neither he nor anyone else testified that every one of the negroes named was unqualified. The testimony that there were negroes qualified for jury duty in Jackson County, therefore, remains undisputed and under the law every one of these should have been selected (Code, §8606, Appendix, p. 30).

Attempts to explain or justify the exclusion.

We have already called attention to the inconsistent positions taken by the Trial and the Supreme Court. Judge Callahan, as we have seen, held that there were qualified negroes in Jackson County—that negroes appeared on the

*What the Delaware Chief Justice had said was:

> "'that none but white men were selected is in nowise remarkable in view of the fact—too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience or moral integrity to sit on juries'" (103 U. S., at pp. 393-4).

jury rolls. The Supreme Court, on the other hand, expressed doubts whether there were any qualified negroes and refused to pass on the question whether the names of negroes appeared on the rolls. We examine separately the explanations accepted by each court.

The explanation accepted by the Trial Court.

Judge Callahan rested his denial upon the ground that the names of negroes appeared upon the jury roll. A brief recital of the facts concerning the make-up of the jury roll will facilitate an understanding of the evidence.

The commissioners who prepared the rolls from which the grand jury was drawn consisted of Stewart, who testified, Winn, who did not testify, and Jenkins, who was present in court but did not testify (69). Kelly Morgan, the clerk of this commission, also testified (69). The Stewart Commission went out of office in March, 1931 when the new jury commission was appointed (57). The new commission made up a new list which is only incidentally here involved. The making up of the jury roll is in three stages: (1) Names were obtained by the clerk—the voting list, a list from the tax books and "probably" a telephone directory (75). (2) From these a temporary list was made up. The clerk testified that this temporary list contained male citizens of the county without regard to race or color (75). He testified (75) that it contained all male citizens, but on the same page said he did not know whether this was the case. (3) From the temporary list prepared by the clerk, the commission directed what names were to go on the roll. The clerk thereupon posted these names on the roll* and on the cards that went into the jury box (70). From the box are drawn both grand and petit jurors (61).

The important point in this process is the method by which the names on the list get on the jury roll. The list

*The original books constituting the jury rolls in question will be handed up to the Court in connection with this application.

contains the names of persons both "qualified and unqualified" (110). The commission then calls in men from the different precincts of the county and they check the names of men in their precinct "where they are supposed to know all of these parties" (110). As the commissioner put it: "*We take those people's word for it,* the men who come in, the law gives us that right" (109).

There is no testimony what principles these men who were called in applied; there is no testimony that they were sworn or performed any official duty; there is nothing to show that they did anything more than continue the age long process of exclusion.

Judge Callahan rested his decision that negro names appeared upon the rolls on two grounds: (a) that there had been "emphatic", "positive" testimony before Judge Horton that there had been negroes on the roll (164); (b) that the defendants themselves had pointed out by their witnesses that there were several negro names on the jury roll. On these two bases his decision rests,—each without foundation:

(a) Not only was there no emphatic or positive testimony to this effect before Judge Horton, there was nothing from which the defense might have drawn the inference that the state would ever claim that negroes appeared on the jury. The only possible testimony to which Judge Callahan might have referred was that of Commissioner Stewart. If his testimony is carefully read it becomes apparent that when he was talking about negroes being on lists he was talking not of the permanent jury roll but of the preliminary lists from which it was drawn (109-111). He was unable to give the name of any negro whose name might be on the jury roll (111). Finally, when asked before Judge Callahan "whether or not names of colored persons were on the jury roll", he answered, "No, sir, I don't know whether there is or not" (84).

(b) We have disposed of the "positive" testimony, the "emphatic" testimony relied upon by Judge Callahan. We

now turn to the six names which he contends witnesses called by the defense showed were on the jury rolls.

The State in the hearing before Judge Horton made no attempt to show that the names of any negroes appeared on the rolls. Indeed, the State threw obstacles in the way of obtaining the rolls, the Attorney General objecting before Judge Horton to their production (668, 669).

When the rolls were finally produced before Judge Callahan, the defense asked several white officials to examine them and point out the names of colored people. The rolls were gone through, page by page, and six names were found. They are as follows:

Precinct	No.	1	Mark Taylor	(64)
"	"	3	Cam Rudder	(65)
"	"	10	K. D. Snodgrass	(60)
"	"	14	Pleas Larkin	(67)
"	"	21	Travis Moseley	(67)
"	"	21	Hugh Sanford	(62)

If it be assumed that these six entries in a list of many thousands were genuine, they would not be sufficient to rebut the evidence of a half century of exclusion.

But the inescapable fact is that these names were not on the old jury rolls while they were current, but were written in after those rolls had become obsolete and a new jury commission had been drawn. This is the inevitable conclusion from the following undisputed facts:

1. The rolls from which the Grand Jury were selected that brought the indictment in this case were those prepared by the Stewart Commission (57, 58, 78). The Stewart Commission went out and the new commissioners came in in March, 1931 (57). The new commissioners were required to empty the jury box and to make up a new list (65).

2. As a preliminary the new commissioner Moody directed the new clerk J. D. Snodgrass, Jr., to draw lines after the old names (63). The lines were drawn by the new clerk.* Except for the lines drawn in blue ink under letter A and letter B names in precinct 1, the lines drawn were all red lines (63). Whatever the new clerk wrote in the book was below these red lines (63). The old jury names were above the red lines—"It is the names above the red lines that constituted the jury roll from which this Grand Jury was drawn" (57). The red lines, it is undisputed, were drawn by the clerk of the new commission in the presence of Mr. Moody (63), although Moody did not see him draw all of the red lines throughout the book (66).

3. The clerk of the old commission (Morgan) testified that he had not put in the red lines; that when he finished with those books there were no red lines that he knew of (74).

4. The only names on the jury roll that were testified to as being the names of negroes—the six above referred to—appeared in each instance immediately above the red lines. And no negro's name appears in any other position.

5. An expert examiner of questioned documents of distinguished reputation (149) testified that the ink used in writing each one of these names (152-161) is superimposed upon the red lines and therefore must have been written after the red lines were drawn. The expert was not cross examined. His testimony is uncontradicted.

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*Moody testified that it was customary when drawing these lines to leave a line blank after the names which had been written by the old board (64-65). The books show that except in a few instances this was generally done. Opportunity, therefore, existed for the insertion of names above the red lines so that it might appear that they had formed a part of the old jury roll.

The conclusion is inescapable that the books were tampered with and that the six names all appearing in the same position were written in after the new jury commission came in and after the red lines drawn there to distinguish the old jury list from the new had been placed in the book.* Judge Callahan admitted that the matter was suspicious and that he would have been in grave doubt (165) had it not been for the following reasons, which, however, cannot in any sense support his conclusion.

a) Judge Callahan refers (164) to the fact that the witness "right at the beginning of his testimony" mentioned a date, presumably 3/20/31 (154), as written under the red line, but dates written under the red lines are of no significance and especially irrelevant is it whether the new clerk may have written the date on which the new jury commission took office before drawing the red line or after drawing the red line. The relevant fact is that every negro name supposed to have been on the old jury rolls was superimposed upon the red lines and that the red lines were drawn after the new commissioners came in.

b) Judge Callahan refers also (166) to an entry dated in March, 1929, which he said appeared to be *under* the red lines. The record shows no such entry. But in any event the significance of the argument is difficult to grasp. A forgery is shown only when an entry purporting to be part of the old jury roll is written *over* lines that were drawn after the new jury commission came into office.

c) Finally, Judge Callahan thought that he would not be authorized to presume that someone committed a crime

*This Court can see this fact for itself from an examination of the original books. The expert also called attention to the difference between the kind of ink used in writing these six names and that used in writing the other names (153-159).

or to cast a reflection on the officers whose duty it was to keep the books (166-167). But whatever may be the implications the fact is that the evidence is uncontradicted and unexplained that names were written into an old jury roll after new commissioners came in.

The Supreme Court expressly declined to pass on the question whether the names were "fraudulently placed there" (683). They said: "This charge in no manner involves any member of this jury board" (683). The Supreme Court having rested their decision upon other grounds held that a consideration of this matter is "wholly immaterial, and we pass it by without any expression of opinion thereon" (684).

The explanations accepted by the Alabama Supreme Court.

The grounds upon which the Supreme Court based their denial of the motion to quash likewise find no real support in the evidence:

(1) They say that more white male citizens of proper age qualification were excluded than negroes (681). But this is no answer to the contention that *no* negro was ever called to serve and that *no* negro name appeared on the jury rolls. Especially is this the case in a community where under the statute *all* qualified males were required to be placed on the jury rolls (Code, § 8606, Appendix, p. 30).

(2) They indicate doubts whether there were any qualified negroes (683). But they do not state this as a finding or suggest that the evidence would warrant any such finding. And as we have seen, *supra*, such a finding would not be supported by the evidence.

(3) They rest their judgment on the testimony of the commissioner which they state was to the effect that the

matter of race or color "never entered into their discussion or consideration in selecting those to go upon the jury roll, and they did not know, and, therefore, could not say whether any of the negro race was on the roll or not" (681) and further, that the jury commission did not "automatically or systematically exclude anybody" and that the question of race or color was not mentioned and no one excluded on account thereof (681).

There are to be sure, general statements in the record to that effect. Commissioner Stewart testified that they never discussed race or color (84, 111, 112, 113, 115), that "we didn't automatically or systematically exclude anybody" (85). But the detailed testimony gives no facts to support the conclusion that there was no discrimination. The commissioners presented temporary lists to various unidentified persons in the different precincts and had them check off from those lists the names deemed by them to be qualified. The commissioners took the selection of these unknown persons.* Consequently the selection was made by those persons. There is nothing to indicate that they did not intentionally exclude negroes. The presumption of discrimination from the continued exclusion of negroes has, therefore, in no way been overcome since the actual selectors did not testify. The bare protestations of Stewart are without meaning in these circumstances.

The general statement that race or color was not discussed must be considered in connection with testimony overlooked by the Supreme Court that on the lists, before the rolls were finally made up, there appeared after the

*The Supreme Court in discussing this phase of the case misread the record. They refer to the commission as "calling in people from different precincts" and "questioning them" (681). The evidence is that the unnamed persons made the actual selection, "they checked off the names of the qualified jurors" (109). The commission took "their word for it" (109). There is not the slightest evidence that they were in any way questioned by the commission.

names of colored people the word "col." (109).* It was not necessary for any one to discuss race or color. Exclusion, under these circumstances, could be perfect without a single word being spoken.

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Finally, the matter of discrimination is put beyond question by the testimony of the commissioner himself. The lists contained the names of negroes. The rolls, on the other hand except for the spurious six, contained the names of none. Negroes were, therefore, rejected either because they were not qualified or arbitrarily. We have seen that there is a total absence of evidence of any witness who testified, except in general terms, to the exclusion of negroes because they lacked qualifications. What was not commented on by either the lower or higher Alabama Court was that the commissioner himself, in a series of questions, specifically denied that he had ever excluded any negro because of his age, because he was not a person esteemed in the community, because he was lacking in judgment or had a disease affecting his mentality, or had been convicted of a crime involving moral turpitude, or because, not being able to read he was not a freeholder or householder (112); that he had never had occasion to exclude any negro by reason of any of the disqualifying provisions (113).

Clearly, there can be no basis for the assumption that the exclusion of negroes in Jackson County rested on any principle other than race.

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*The commissioner himself testified not that he did not know whether he was passing on negroes or whites, but that "he didn't know them all" (113-114).

POINT III.

The court denied petitioner's constitutional rights in refusing to quash the venire of the petit jury in Morgan County where negroes had for years been excluded from jury service.

1) Nearly twenty per cent. of the population of Morgan County in 1930 was colored (478)*,—37,865 whites, 8,311 colored.

2) Intelligent witnesses (431, 437, 439, 447, 452, 456, 459, 461, 467, 468) named nearly 200 negroes who they said complied with the qualifications necessary for jury duty. The names included college graduates (431, 437, 456, 459, 465), physicians (468), dentists (431, 465), preachers (451, 453), business men (453), real estate owners (465, 470), a notary public designated by the governor as of good moral character (454), teachers (449, 453), a school principal licensed by the State of Alabama after an investigation as to mentality, academic qualifications and moral standing and "certified as the type of person to teach the citizens of Alabama" (456), Masons (458, 467) and members of other lodges (467, 469), war veterans (445, 461), a first lieutenant in the World War (467). Many were voters (431, 437, 439, 452, 465).** Some had been summoned for duty on federal juries (455, 437).

Dr. N. M. Sykes, a colored physician of standing (468, 469) with the commission of a lieutenant in the medical corps of the United States Army (470) testified that there were many others that could be added to the lists of negroes

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*The U. S. census figures show that the percentage of colored to white persons in this county was even higher from 1890 to 1920, running to nearly 25%.

**The defense was not permitted to show that before a colored man was allowed to vote, he was examined as to his qualifications and required not only to recite sections of the Constitution but to interpret them (432, 438, 439-441, 465).

qualified for jury service (453). The defense counsel stated that he was prepared to furnish proof from about 400 competent, reputable witnesses to substantiate the allegations of the petition pertaining to the qualifications of negroes in Morgan County (472), but the Court limited him to two additional witnesses (464) holding that the evidence was cumulative (473).

The Trial Court implied (495-496) that there was no doubt of the existence of qualified negro jurors in Morgan County. It had indeed excluded further evidence to show the existence of qualified negroes as "cumulative" (473). The Supreme Court, on the other hand, said there was a conflict of evidence (685).

The only testimony that even squints in this direction is the testimony of the Jury Commissioner Tidwell, but he did not testify that there were no negroes in Morgan County who were qualified for jury service, merely that he *knew* of no negroes so qualified (484). He did not pretend to know all the negroes in Morgan County and the record names many of those testified to as qualified whom he admitted he did not know (483, 487).

3) We have, then, a colored community consisting of one-fifth of the population of the county, among whom are many individuals concededly qualified for jury duty. No negro in the memory of men fifty years of age and over had ever served on a jury (434, 441, 442, 448, 452, 453, 457, 459, 463, 464, 466, 469, 470) or ever been called for jury duty (434, 437, 441, 442, 448, 452, 457, 459, 462, 466, 469). The testimony is uncontradicted. Even the white clerk Green, who had called about 2,500 jurors, stated that not one of them was of the colored race (429). A resident of Morgan County for about thirty years, he did not remember ever seeing a single colored person serve on the jury (430).

There is no showing that negroes were unwilling to serve. On the contrary, such evidence as there is, is that they were willing (452, 470).

4) The State made no attempt to show that there were any negro names on the jury roll.

The witnesses for the state questioned by the defense on cross examination were unable to point out any negro names (475, 477). The Court refused to permit the defense to inquire into prior jury rolls (476).*

To overcome evidence so potent there must be a convincing factual showing that the exclusion was not based upon race or color,—a factual demonstration that there was a conscientious attempt to weigh the qualifications of negroes for jury duty. Generalities—conclusions by the officials that there was no exclusion—are of no avail against the stark fact of exclusion continued for half a century (*Lee* v. *Maryland*, 163 Md. 56, 66; *Bonaparte* v. *State*, 65 Fla. 287, 291**; compare *Estes* v. *Commonwealth*, 229 Ky. 617, 619, 620).

The attempts to explain or justify the exclusion.

Both courts (496, 686) relied upon the presumption that the officials performed their duty and upon the unsupported statements by the officials themselves that they never distinguished between white and colored,—that they never discriminated (497, 686).

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*And yet the Trial Court pointed out that if the exclusion ran over a long period of years, it might be sufficient to show an illegal discrimination (496).

**In the Bonaparte case the Court said:

> "It would be beyond the ken of the judicial or any other mind to appreciate how a deputy sheriff in a county containing more negroes than whites could through a series of eight years in selecting jurors for all the courts of the county abstain from selecting a single negro for jury service during all those years, and then come up afterwards and truthfully testify that he had not discriminated against the negro race in the selection of a panel of jurors all of whom still belonged to the white race" (p. 291).

In both the *Lee* and the *Bonaparte* cases the court of last resort of the state reversed convictions on the precise ground of the exclusion of negroes.

The Supreme Court of Alabama referred to *Thomas* v. *Texas* (212 U. S. 278) to justify its conclusion that the facts of the case at bar showed no discrimination by the commissioners, but rather an honest exercise of judgment. However, the court disregarded the fact that in *Thomas* v. *Texas* this court sustained the action of the state officials because a negro was on the grand jury which brought the indictment and negroes were on the venire from which the trial jury was drawn (212 U. S., at p. 283).*

The opinions stress that the jury commissioners talked with various persons. But what information they got is not disclosed. Whether they talked with colored persons is uncertain. The one commissioner who testified** leaves it in doubt (475, 482, 483). He said that "to the best of my recollection" (481) the Commission had passed upon the names of the negroes testified to as being qualified. The names on one of the lists "looks familiar" (481). He was not certain and he could not have been certain because he did not know many of the negroes on the lists (483, 484) and the names, as he finally said, "don't amount to nothing to me" (490).

But if it be taken for granted that the commission did consult unnamed people, did receive unspecified information and then passed upon the names of *all* the negroes in the community, these things would be no answer to fifty years of exclusion. Lip service is not sufficient nor compliance with forms, when the substance is withheld.

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*Indeed, the opinion of the state court, approved by this Court, showed that the officials had regularly drawn a member of the colored race for service on the grand jury and had drawn from one to three negroes each week for service on the petit jury (96 S. W. 1069, 1073).

**Affidavits in general terms and identical language were furnished by the other two commissioners (492, 493). They recited that inquiry was made "wherever practical" as to the qualification of those persons whose names appeared on the list submitted to them by the jury clerk.

POINT IV.

The Court denied petitioner's constitutional rights in refusing to permit the petitioner full opportunity to prove the systematic exclusion of negroes.

The following rulings, all excepted to, hampered the defense in its attempt to show discrimination.

1) Stewart, the Jackson County Commissioner who testified that race or color was never discussed, was not permitted to be cross-examined to show why it was never discussed, why it never *had* to be discussed (86-87, 114).

The Supreme Court recognized the inquiry as material,—for in its opinion it stressed the fact that race or color never entered into the discussion or consideration of the jury commissioners (681).

2) Petitioner was not permitted to show that no negro name appeared on the jury roll of the Moody commission (102, 106-107),—the jury roll subsequent to the one in controversy.

The rulings were clearly erroneous both because the proposed evidence bore on the existence of a deliberate custom and because the fact that there were no negroes on the subsequent lists would have been strong corroboration of the fact that the six negroes' names were forgeries (compare *Bonaparte* v. *State*, 65 Fla. 287, 290).

A similar error appears in the refusal to permit inquiry into the prior jury rolls of Morgan County (476).

The materiality of the error is emphasized by the statement of Judge Callahan (496):

> "I think if it ran over a long period it might be [sufficient] because I think one would be warranted in saying there must have been something that does not appear from the evidence".

3) Judge Callahan assumed—wrongly, as we have seen (*supra*, p. 17)—that there was testimony that there were names of negroes on the jury roll. Especially in view of this assumption it was error to exclude evidence offered by the defense to show that there was no negro name on the jury roll (161).

The reasons given by Judge Callahan cannot stand analysis. He said that counsel should have been prepared with the proof because from the testimony before Judge Horton the previous spring it had appeared that there were negroes on the jury roll (162). But the Court was in error, even in believing there was any such evidence.*

4) Commissioner Tidwell was asked about the qualifications of J. J. Sykes, a colored man who had served on the federal jury (455), whose testimony (451, 452) showed him to be an honorable citizen with a clear understanding of the duties of jurors and of their qualifications.

Tidwell, on the hearing before Judge Horton, knew nothing against the integrity of Sykes (484). Counsel thereupon attempted (486) to inquire into the reasons why Sykes had not been included on the rolls. The Attorney General objected that the discretion of the jury commission could not be impeached by cross examination as to the qualifications of a particular person (485). The objection was sustained (486). Judge Callahan later ruled that one of the questions so excluded should have been admitted (491).

Tidwell thereupon answered that Sykes had been barred because he was badly crippled (491) and because "we had other information which we thought might affect his character" (491).

This answer was inconsistent with Tidwell's earlier testimony that he knew nothing against Syke's character

*Counsel had in vain tried to have the jury rolls produced (116, 132, 668, 669). The Attorney General had explicitly objected to the production of the rolls (669).

(484). Counsel accordingly sought to delve further. The Court refused this saying "That's all you asked for" (491).

5) Since both courts (496, 685) expressly referred to the testimony of Commissioner Tidwell, that the jury commission had in their deliberations considered the names of the colored persons testified to as qualified for jury duty, it was material error to prevent cross examination by the defense (489, 490, 491) to probe whether he could truthfully swear that they had considered each of the names and further, if they did consider the names, just what tests they had applied in considering them.

6) The Alabama Supreme Court assumed—improperly as we have shown, *supra*, page 22—that there was some conflict of evidence whether there were negroes qualified for jury service in Morgan County (685).

Especially upon that assumption it was manifest error to reject the offer of the defense to call numerous witnesses to show that there were any number of negroes eligible for jury service (472, 473).

7) Where discrimination is the issue, it is of the utmost importance that inquiry be unhampered. But when Benson, the newspaper editor, testified that he didn't think negroes had the sound judgment required by the statute (94) because they hadn't made any study of jury duty (94, 96), the defense was not permitted to inquire to what extent white men met these qualifications (96, 98).*

The witness whose cross examination was thus curtailed is a witness to whose testimony on direct examination the Alabama Supreme Court made specific allusion (683).

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*In order to show just how qualified Benson was to express the opinion of the incapacity of negroes for jury service, announced over the defense's objection (93, 94), the defense asked him the meaning of "esteemed" (99). The Court ruled out the inquiry (99) but the Attorney General was allowed to ask several of the negroes their understanding of the meaning of this word (123, 130, 139, 141, 144, 146) over the objection of counsel that the Court had excluded the very question when he put it to the editor (123).

• • •

The inherent difficulty of establishing race discrimination is only too obvious. Error in excluding evidence concerning the fact that is the predicate of the Federal constitutional right is a denial of that right. The point is established by decision of this Court in this very field (*Carter* v. *Texas*, 177 U. S. 442, 448). By the same decision of this Court it is established—as by decisions of state courts too it is established (*Bonaparte* v. *State*, 65 Fla. 287, 291; *Whitney* v. *State*, 42 Tex. Crim. 283, 285)—that error there was in the rulings we have listed,—material, repeated, gravely damaging.

• • • •

CONCLUSION.

Neal v. *Delaware* and *Strauder* v. *West Virginia* become meaningless if communities that have raised themselves to the level of the communities here are not to receive the protection of the constitutional provision enacted for their benefit. Jurisdiction must be taken of this application lest a great principle be nullified.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved, and accordingly a writ of certiorari should be granted and the Court should review and reverse the decision of the Supreme Court of Alabama.

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SECTION 3258. (6264) (4333) (4509) (4990) *Assignment or joinder of error unnecessary; duty of court.*—In cases taken to the supreme court or court of appeals under the provisions of this chapter, no assignment of errors or joinder in errors is necessary; but the court must consider all questions apparent on the record or reserved by bill of exceptions, and must render such judgment as the law demands. But the judgment of conviction must not be reversed because of error in the record, when the court is satisfied that no injury resulted therefrom to the defendant.

SECTION 6433. (3019) (616-620) (2761) (3113) (2760) (2358) *When bill signed.*—Bills of exceptions may be presented to the judge or clerk at any time within ninety days from the day on which the judgment is entered, and not afterwards; and all general, local, or special laws or rules of court in conflict with this section are repealed, abrogated and annulled. The judge or clerk must indorse thereon and as a part of the bill the true date of presenting, and the bill of exceptions must, if correct, be signed by the judge within sixty days thereafter. When the bill of exceptions is presented to the clerk, it shall be his duty forthwith to deliver or forward it to the judge. Presentation of the bill of exceptions within ninety days after the granting or refusing of a motion for a new trial shall be sufficient to preserve for review the rulings of the trial court on the trial of the original cause, as well as the ruling of the court on the motion for a new trial.

SECTION 6434. (3020) *Striking bills of exceptions, and declining to consider them because not signed within time required.*—The appellate court may strike a bill of exceptions from the record or file because not presented or signed within the time required by law, but shall not do so ex mero motu, but only on motion of a party to the

record of his attorney; the object and effect of this statute being to allow parties to waive or consent for the time of signing bills of exceptions.

SECTION 6670. *Executions on judgments; new trial must be asked in thirty days.*—After the lapse of ten days from the rendition of a judgment or decree, the plaintiff may have execution issued thereon, and after the lapse of thirty days from the date on which a judgment or decree was rendered, the court shall lose all power over it, as completely as if the end of the term had been on that day, unless a motion to set aside the judgment or decree, or grant a new trial has been filed and called to the attention of the court, and an order entered, continuing it for hearing to a future day. (1915, p. 707, Sec. 3.)

SECTION 8603. (7247) *Qualifications of persons placed on jury roll and in jury box.*—The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English, and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box. (1909, p. 305, Sec. 11.)

SECTION 8606. *Jury commission must place name of every qualified person on jury roll: Use of initials alone not allowed.*—The jury commission shall see that the name of every person possessing the qualifications prescribed by

this chapter to serve as a juror shall be placed on the jury roll and in the jury box, and they may summon and cause to attend before them any person residing within the county and examine him on oath, touching the name, residence, occupation and qualification of any person residing in the county. The commission must not allow initials only to be used for a juror's name, but one full Christian name or given name, shall in every case be used, and in case there are two or more persons of the same or similar name, the name by which he is commonly distinguished from the other persons of the same or similar name, shall also be entered as well as his true name. (1909, p. 305, Sec. 14.)

SECTION 9459. *Motions made in writing, on appeal, become part of record.*—All motions which are made in writing in any circuit court or any court of like jurisdiction in any cause or proceeding at law, shall, upon an appeal become a part of the record, and the ruling of the court thereon shall also be made a part of the record, and it shall not be necessary for an exception to be reserved to any ruling of the court upon any such motion; and it shall constitute a part of the record proper on appeal. (1915, p. 598, Sec. 1.)

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